Supreme Court U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH P. GALLUZZI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of Miller-Ed v. Cockrell, 123 S.Ct. 1209 (2003) and Ring v. Arizona, 536 U.S. 584 (2002) and the pending case of Blakely v. Washington, No. 02-1632 (Oct. 20, 2003), is a 6th Amendment Constitutional denial shown where a Judge, alone, increased a jury verdict, (which fixed a Guideline level of 10 crime) to a greatly aggravated level 28 crime, by injecting uncharged pecuniary loss not submitted to a jury?

2. Whether a denial of the 6th Amendment right to effective assistance of counsel is shown by the cumulative prejudice of judicial reliance upon defense counsel's substandard conduct including counsel's stipulation to an erroneous, irreconcilable, after the fact document which was wrongfully used in calculating an alleged loss, from a Bond transaction, and the failure to enforce the appearance of a key subpoenaed defense witness?

3. Whether a denial of a 6th Amendment right is shown by the government's utilization of investigative evidence gathered through a civil action (SEC) and used for the criminal matter, which material was denied to the defense by the denial of discovery at all stages of the proceedings? Does this constitute willful prosecutorial misconduct, obstruction of justice and concealment of evidence?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES iii

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

FACTUAL BACKGROUND 7

§2255 PETITION AND CERTIFICATE OF APPEALABILITY DENIED WITHOUT CONSIDERATION OF RING VS. ARIZONA 9

§2255 PETITION AND CERTIFICATE OF APPEALABILITY DENIAL IGNORING PREJUDICE OF SUBSTANDARD CONDUCT 10

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 26

INDEX TO APPENDICES

Order and Opinion of United States Court of Appeals for the Third Circuit dated April 29, 2003. A-1

Decision of United States District Court for the District of New Jersey dated June 26, 2002. A-3

Denial of Petition for Rehearing, re: Certificate of Appealability September 26, 2003 A-14

Application for Certificate of Appealability dated November 1, 2002 A-15

Memorandum of Law Supporting Petition for Certificate of Appealability dated November1, 2002. A-25

Petitioner's Reply Brief to Opposition for Certificate of Appealability dated December 26, 2002. A-73

Third Circuit - The Forerunner to Ring A-91

Petition for Rehearing In Banc or Before Panel dated May 8, 2003. A-95

Brief for Appellee - Direct Appeal. Pgs. 57-60. A-110

SEC Correspondence to AUSA Ralph Marra dated March 7, 1997. A-115

SEC Privileged Log A-117

Affidavit - Felipe Ferrand Defense Expert
dated September 11, 2000 A-143

Memo - New Jersey Local Finance Board
dated May 1, 1995. A-147

Reply Brief for Appellant-Direct Appeal Page 4. A-149

Report Andrew Kalotay Associates -
Additional Defense Expert – §2255 Petition
dated October 12, 2000. A-151

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Adams v. Peterson, 968 F.2d 835 (9th Cir. 1992) 19

Apprendi v. New Jersey, 530 U.S. 466 (2001) 4,9,15

Berger v. United States, 295 U.S. 78 (1934) 21

Blakely v. Washington, No. 02-1632
(Oct. 20, 2003) 3,4,5,13,14
passim

Brookhart v. Janis, 384 U.S. 1 (1966) 20

Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979) 18,19

Government of the Virgin Islands v.
Frederick, 865 F2d 59 (3rd Cir. 1989) 18

Miller v. Florida, 482 U.S. 423 (1987) 16

Miller-El v. Cockrell, 123 S.Ct. 1209 (2003) 5,17

Mistretta v. United States, 488 U.S. 361 (1999) 16

Ring v. Arizona, 563 U.S.584 (June 2002) 3,4,5,6,9 *passim*

SEC v. Dresser, 628 F.2d 1368 (1980) 22,23,24

Strickland v. Washington, 466 U.S. 688 (1984) 18,19

Sumerline v. Stewart, (9th Cir. en banc) No. 98-99002, Sept. 2, 2003, on rehearing in 267 F.3d 926 (9th Cir. 2003) 15

United States v. Cepero, 224 F.3d 56 (3rd Cir. (2000) 17

United States v. Cronic, U.S. 648 (1984) 19

United States v. R.L.C., 503 U.S. 29 (1992) 16

United States v. Williams, 235 F.3d 858 (3rd Cir. 2000) 16

STATUTES AND RULES

18 U.S.C. §666 7

18 U.S.C. §1341, 1346 7

18 U.S.C. §1343, 1346 7

18 U.S.C. §1952	7
28 U.S.C. §2255	8,9,10,12
OTHER	
Federal Rules of Criminal Procedure 15-17	24
Fifth Amendment of the United States Constitution	2,12,24
Sixth Amendment of the United States Constitution	2,6,14,19
U. S. Sentencing Guidelines	16,17
U. S. Sentencing Reform Act	17

IN THE
SUPREME COURT OF THE UNITED STATES

Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

- The opinion of the United States Court of Appeals (Third Circuit) appears at A-1 to the Petition and is unpublished.

- The Opinion of the United States District Court appears at A-3 to the Petition and is unpublished.

JURISDICTION

For cases from Federal Courts

- The date on which the United States Court of Appeals decided this case was April 29, 2003. A-1.

- A timely petition for rehearing was denied by the United States Court of Appeals (Third Circuit) on the following date: September 26, 2003, and a copy of the Order denying rehearing appears at A-14.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1251(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...; nor be deprived of life, liberty, or property without due process of law.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ... [and] to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

Unpublished Opinion Dilemma

Petitioner finds himself in the position to challenge "Opinions" marked "not for publication" by both the District Court and the Circuit Court of Appeals. These decisions, despite the magnitude of their impact, classifies these Opinions as not to be cited for precedent or included in the database of judicial opinions. As is common practice where an "unpublished opinion" is used there is a dismissive disposition of the facts of the matters and the supported documented claims made. This Petitioner has been prejudiced; his ability to obtain a fair and complete review of his appeal process has been denied. Coupled with the fact that the District Court, the Government and the Third Circuit Court of Appeals failed or chose not to address any of the claims put forth by the Petitioner is beyond comprehension in light of ones right of "due process". Thus, the following issues and required extended Appendix forced by this practice is submitted.

The First Issue presented in this case involves important 6th Amendment constitutional questions that should be settled by this Court which has been decided by the Third Circuit Panel, in a way that conflict with the decisions of this Court in Ring v. Arizona, 563 U.S. 584 (June 2002). The same issue is presently before this Court Blakely v. Washington, No. 02-1632 (Oct. 20, 2003).

This Third Circuit Panel's decision is also in conflict with other Third Circuit decisions on the same

issues. There is, as seen in Blakely, a conflict in the various courts respecting the same. Specifically, here the sentencing Judge, alone, greatly aggravated the crime of conviction from the jury verdict. This aggravation was implemented by the improper determination of an alleged pecuniary loss, uncharged and not found by a jury.

Under the Jury's verdict, the Petitioner's sentence was a level 10, i.e., a sentence not to exceed twelve (12) months, the sentencing Judge, alone, increased the level 10 crime to a level 28, imposing an increase sentence to 90 months, 78 months beyond the jury verdict. The District Court totally ignored the Ring mandate respecting a jury verdict guaranteed by the 6th Amendment of the Constitution of the United States. The Petitioner raises this conflict as a substantial showing of a Constitutional denial, citing Apprendi v. New Jersey, 530 U.S. 466 (2001) in support of his §2255 Habeas Corpus Application, and then following in the Circuit Court the supporting decision of Ring v. Arizona. The District Court chose to ignore Petitioner's Ring argument and held Apprendi as not applying to the Federal Sentencing Guidelines. The Third Circuit, it appears, without review, also ignored Petitioner's Ring claim and denied a "Certificate of Appealability".

In Blakely, presently pending before this Court, a similar sentencing guideline challenge is presented. That case invokes the guidelines of the State of Washington, which are indeed near - identical, to the Federal Sentencing Guidelines. The case at bar presents a timely opportunity to decide the conflict among the Circuits regarding the federal law, as well as the State law. As in Blakely, this case addresses the decision of

this Court in Ring v. Arizona. Ring held that juries, not judges, must find the "aggravating" pecuniary facts that increases a defendant's sentence. Blakely raises the same issues on a state level raised by Petitioner below:

- Does the Ring decision apply to non-death penalty cases, as the language of this Court appears to state?

- Does the Ring decision apply to the Sentencing Guidelines?

- Does the zone between the maximum guideline range of the jury verdict, and sentence imposed, exceed the Constitutional limit of Court enhancement of a sentence?

On appeal, a panel of the Third Circuit, without reasoning, denied a Certificate of Appealability to the Petitioner. The Application for a Certificate of Appealability stressed, among other important issues, the ignoring of Ring by the District Court. Petitioner then urged reconsideration in light of Miller-El v. Cockrell, 123 S.Ct. 1209 (2003).

In Miller-El, this Court stated that a Certificate of Appealability should be issued where the lower court ignored, without full consideration, essential facts and legal claims shown by the Appellant. This Court further stated, in Miller-El, that a Certificate of Appealability should be granted where the claim of Constitutional denial is "debatable among jurists of reason". Credibily, the granting of the writ of certiorari in Blakely was based on the establishment of debatability. The Petitioner urges that such debatability is clearly present

in this case. Panels of this same Third Circuit, even prior to Ring, adopted the rationale of protecting such a jury guarantee See A-91 to A-94 "Third Circuit - Forerunner to Ring". The clear mandate of this Court, as hereinafter set forth, places this Third Circuit Panel's decision in direct conflict with Ring v Arizona.

The Second Issue addresses the showing of a 6th Amendment violation claim resulting from the ineffectiveness of counsel. Here again, the District Court and Appeals Court ignored the clear documented facts and legal argument of the Petitioner. The substandard commissions and omissions of counsel included the prejudicial stipulation of defense counsel to a government's mischaracterization of a dated and incorrect schedule, at sentencing, without the consent of Petitioner or an explanation of the severe impact of same on Petitioner's sentence. The District Court compounds the effect by not giving any instruction, inquiry or explanation, to the Petitioner, as to the impact the Court's reliance on said schedule would have on Petitioner's sentence.

The Third Issue is one of Prosecutorial Misconduct and Agency Bad Faith. It ranges from the use of a simultaneous civil action, by the Securities and Exchange Commission, (SEC), to gather evidence for the government's criminal action, together with the concealment of trial evidence.

The government enjoyed a unilateral stay of discovery against Petitioner. The government, though successful in obtaining a stay of discovery from the simultaneous civil action, for all parties, dishonestly represented to the Court that no discovery had been

made to that time, and then in defiance of said "Order" continued to request and receive SEC investigative material after the date of the "Order" and before the criminal trial had been concluded. Petitioner/Appellant was prejudiced by being denied discovery of the same material and information that the government improperly obtained and utilized.

A. FACTUAL BACKGROUND

By Superseding Indictment No. 96-640, Petitioner was accused of fourteen counts of mail fraud (18 U.S.C. §1341, 1346) two counts of wire fraud (18 U.S.C. §1343, 1346), five counts of bribery (18 U.S.C. §666), and five counts of using a facility in interstate commerce to commit bribery (18 U.S.C. §1952).

The charges were premised on the theory that Petitioner abused certain financial positions he held with Essex County by taking alleged bribes or kickbacks in exchange for referring bond and financing projects to various entities. On April 24, 1998, the jury found Petitioner guilty of all 26 counts. The jury did not find nor were they asked to find aggravating elements/factors of pecuniary loss or obstruction of justice. Instead, a sentencing hearing was conducted before a judge to determine an amount of alleged loss. After that hearing, the sentencing court, alone, concluded that a preponderance of the evidence showed that the loss exceeded $5 million, warranting an increase of 14 levels to the offense level. The loss was based on non-jury findings and were allegations that Essex County lost millions of dollars as a result of a debt re-structing plan, not alleged in the indictment.

The court also held that a 2-level increase for an alleged obstruction of justice was warranted, based on testimony before the Securities and Exchange Commission. Ultimately, the offense level was aggravated to be 28 and the corresponding guideline range 78-97 months. Accordingly, on September 10, 1998, the Court sentenced Petitioner to concurrent terms of 90 months imprisonment on several of the counts, and lesser concurrent terms on other counts, as well as restitution in the amount of $350,000. A judgment was entered accordingly on September 18, 1998.

On appeal to the United States Court of Appeals for the Third Circuit, petitioner raised various issues, including that: the evidence of guilt was legally insufficient; the district court erroneously admitted certain evidence; the prosecutor's conduct in connection with a civil proceeding was improper; the court should have applied a heightened burden of proof when evaluating the amount of loss; and that the court's findings regarding the loss and obstruction of justice were not supported by the record. The conviction and sentence were affirmed in an unreported decision on May 28, 1999, and a petition for a writ of certiorari was denied on December 6, 1999, 528 U.S. 1048 (1999).

A petition for a writ of habeas corpus was filed pursuant to 28 U.S.C. §2255 on December 6, 2000. This petition was denied pursuant to district court's opinion dated June 26, 2002, Ordered June 28, 2002. A-3 to A-13

B. §2255 Petition and Certificate of Appealability Denied Without Consideration of Ring vs. Arizona.

Ring v. Arizona is applicable in this case. It requires that the alleged loss and obstruction of justice facts, which drastically aggravated the sentencing range level above the crime of conviction, be found by a jury not a judge alone. The District Court totally failed to address, or consider, the then recent United States Supreme Court decision of June 24, 2002, in Ring v. Arizona. Petitioner urges that Ring mandates that the portion of the statutory scheme under which the District Court enhanced Petitioner's crime of conviction to a higher level, based on aggravating uncharged and unfound crime outside the jury verdict was unconstitutional. It violates Petitioner's guarantee of a jury trial. Had the District Court addressed the Ring declaration, its opinion and order would have necessitated that the §2255 Petition be granted.

The District Court held that, "Appellant's sentence was not unconstitutionally enhanced". A-5 to A-8. The District Court acknowledge that the enhancement of Petitioner's sentence, "were on the basis of loss and obstruction of justice, where the jury was not asked to decide on these issues". A-8 to A-9. The Court erroneously held that "Apprendi is not applicable to Appellant's situation because the penalty imposed, on Appellant, was within the statutory range." id. Not only was the Court in error on its basic Apprendi premise, it failed to respect the Third Circuit cases on the subject. A-91 to A-94, "Third Circuit - The Forerunner to Ring".

The Third Circuit following a practice of automatic deference to the District Court, likewise failed to consider Ring and its own decisions to the contrary. The rubber stamping practice of some Panels, of the Third Circuit, results in a generic denial of a Certificate of Appealability without reasoning, relying solely on the District Court's incomplete review of Petitioner's petition.

C. §2255 Petition and Certificate of Appealability Denial Ignoring Prejudice of Substandard Conduct.

Despite Petitioner's substantial showing of defense counsel's ineffectiveness, and resulting prejudice, the government, District and Appeals Courts, failed to challenge or dispute, in any manner, the facts presented by Petitioner. Therefore, these unchallenged claims must be accepted as factual and correct. Petitioner has clearly pointed to specific errors and omissions that document the fact that he did not receive reasonably, competent and effective assistance of counsel, and of prosecutorial misconduct which seriously prejudiced Petitioner, causing his sentence to be unfairly enhanced.

- Defense Counsel failed to bring before the Court the testimony of 2 A.G. Edwards V.Ps that contradict the government's and the Court's findings regarding alleged kickbacks, and failed to object to the increase to alleged monetary loss calculation of alleged kickbacks. A-39 to A-41 of Memorandum and A-49 to A-63, 1998 Bond Refunding.

- Defense Counsel failed to correct the Court in its mischaracterization of loss as opposed to testified costs. A-48 to A-53.

- On A-53 to A-57, defense counsel "stipulates", without Appellant's consent to the reliance on Government Exh. CH-9, to "sell bond deal" to BOCF. The schedule in the Exhibit was not available to Appellant as the Court assumed. Defense counsel fails to correct the Court on its reliance. Impact $4.7 million added to loss calculation enhancement. This "stipulation" is unconstitutional. id. A-57.

- Defense counsel fails to ask government's expert to produce his work papers, that were subpoenaed and thereby foreclosing defense expert witness to challenge government's report, thus prejudicing Appellant. A-143 to A-146, Defense Expert's Affidavit.

- Defense counsel failed to enforce the appearance of subpoenaed key. witness: at sentencing. A-59 to A-63.

Since no response or challenge is made by the government, District Court or Appeals Court, each must be accepted as true and accurate for Petitioner. No government dispute exists to the ineffective counsel facts presented in Petitioner's "Memorandum of Law", filed to support the request for a Certificate of Appealability. A-25 to A-72, Also see A-15 to A-24, "Application for a Certificate of Appealability".

D. **§2255 Petition and Certificate of Appealability Denied Ignoring Prosecutor's Misconduct and Obstruction of Justice.**

- U.S. Attorney used improperly obtained SEC investigative material, at trial, in violation of an "Order" staying discovery and the limitation's as set forth in the Federal Rules of Criminal Procedure 15-17.

- The U.S. Attorneys alliance, confluence with the S.E.C.'s Division of Enforcement and the manner in which it was orchestrated did undermine and violate Appellant's due process and 5th Amendment privileges.

- . The U.S. Attorney falsely states, to the Court, that they did not receive or share investigative material with the S.E.C. up and until the time of the execution of the "Order" staying discovery (12/8/97). See Memorandum of Law, A-63 to A-70 and, "Brief for Appellee" A-110 to A-112. Appellant's discovery of documents, almost three (3) years after trial exposes this blatant misrepresentation to the Court.

- Subsequent discovery, granted to Appellant (2001) uncovered critical documentation previously suppressed and concealed that would have impacted favorably for Appellant, on certain aspects and allegations at the criminal trial.

Reasons for Granting the Petition

(1) The Lower Court's Conflict With Ring v. Arizona and Decisions of Other Panels of Third Circuit.

The conflict with the Supreme Court's decision in Ring v. Arizona, 563 U.S. 584 (2002) combined with the District Court's opinion and the Appellate Court's ignoring of same, without reasoning, is important reason for this Court to grant this Petition.

This Court's clear mandate in Ring v. Arizona has been totally ignored here and in other Circuits. This Court's serious concern for the erosion of the 6th Amendment jury guarantee is demonstrated and arrogantly paraded before it, in this case. It is not a question of misunderstanding this Court's directive - No - it is the full ignoring of the same. The well documented collection of cases in conflict on these issues and the Blakely case is incorporated herein by reference.[1] It calls for the exercise of this Court's supervisory power. The issues in Blakely raises important questions of federal law that have not been, and should be settled by this Court. Blakely involves State sentencing guidelines with a feigned position that the U.S. Sentencing Guidelines are different. That position in Blakely, left unresolved, will seriously set back prior decisions of this Court, regarding the legislative authority of the Federal Sentencing Guidelines. The granting of this writ of certiorari will

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[1] Particularly see Brief Amici Curie of the National Association of Criminal Defense Attorneys, filed in Blakely v. Washington, and A-91 to A-94, "Third Circuit Forerunner to Ring".

prevent any further conflict with the ultimate decision by this Court in Blakely.

(1a) Ring v. Arizona - Claim Ignored.

The Miller-El standard of "debatability among jurists of reason" places before this Court the hostile reception of Ring v. Arizona by the Circuit Court Panel. The Third Circuit is representative of Circuits that have, within its own Panels, a severe conflict with Ring's rationale to protect the 6th Amendment jury trial guarantee. See Blakely v. Washington, supra, and A-91 to A-94 "Third Circuit – The Forerunner To Ring". This Court, most strongly, stated in Ring:

> "What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed". Ring v. Arizona, No. 01-488, June 24, 2002, (Scalia, J. concurring at page 4).
>
> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment". We see no reason to differentiate capital crimes from all others in this regard". Ring, id. at p. 2 and 21, Op. of the Court, Ginsburg, J.
>
> "The right to a trial by jury, guaranteed by the Sixth Amendment, would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death". "We hold the Sixth

> Amendment Applied to both". Ring, id. at 23 - Ginsburg, J. Op. of the Court.
>
> "... Whether the statute calls them elements of the offense, sentencing factors or Mary Jane -- must be found by a jury beyond a reasonable doubt". Ring, id. Scalia, J. concurring p. 2.
>
> "*** over the last 12 years accelerating propensity of *** Federal legislatures to adopt sentencing factors: determined by judges that increase punishment beyond what is authorized by the jury verdict *** cause me to believe that our peoples traditional belief in the right of trial by jury is in perilous decline ***" Ring, id., Scalia, J. concurring at p. 3.

Some circuits restrict this preservation of jury guarantee to capital legislative sentencing schemes only, as noted in Blakely. Yet, this Court expressly stated that it "applied to both" capital and non-capital cases. Ring, id at 23, Ginsburg, J. Op. of the Court. The more recent decisions recognize the Ring reasoning as "substantive" and "structural" and also deem it to treat it as merely an extension of Apprendi v. New Jersey, see Sumerline v. Stewart, (9th Cir. en banc) No. 98-99002, Sept. 2, 2003, on rehearing in 267 F.3d 926 (9th Cir. 2003).

In the case at bar, Petitioner raised the issue that the Federal Guidelines have the status of "law" preempting old statutory maximums. This is similar to Ring deeming unconstitutional a legislative regime that permitted the sentencing judge, alone, to increase a jury verdict to a greatly aggravated crime by injecting

uncharged pecuniary facts. A parallel structure exists under the Federal Sentencing Guidelines relative to the fraud crime alleged here. The pecuniary facts, in both cases, determined the various ranges of grids of crime and their respective maximum penalties. These facts were found by a judge, alone.

Petitioner below-urged alternatively that: (1) the sentencing maximum for the crime of conviction is fixed by the U.S.S.G., and (2) In light of Ring v. Arizona the portion of the Guideline regime that permits such judge transformation of jury verdicts, is unconstitutional.

The Third Circuit case of United States v. Williams, 235 F.3d 858, 868 (3rd Cir. 2000), was relied upon by the lower courts. It holds the 6th Amendment protection does not extend to the Guideline maximum. It is in conflict with Ring. It is also in conflict with other decisions of this Court respecting the statutory nature of the Guidelines. In this respect the Court's attention is lead to the decisions in United States v. R.L.C., 503 U.S. 29 (1992), Mistretta v. United States, 488 U.S. 361 (1999); and Miller v. Florida, 482 U.S. 423 (1987). The lower courts, however, relied upon Williams to support the maximum allowable sentence being mandated by the pre-Guideline statute and ignored Petitioner's urging of R.L.C., Mistretta and Miller, as controlling.

Petitioner urges that this Court clarify that the Federal Guideline range decisions have the "force and effect of law". Mistretta v. United States, supra at 415, Scalia, J. dissenting. Also affirming the holding of this Court that the Guidelines are "law" in Miller v. Florida,

supra and United States v. R.L.C., supra, that Guidelines are "statutes".

Determinate sentences were established as a result of the U.S. Sentencing Reform Act and the implementing U.S. Sentencing Guidelines. The maximum sentence imposable by the Court is constrained by the guideline criminal classification, the bundling of offenses and the ranges as established by the conviction of the elements of the crime. The statutory maximum previously applied during the period of indiscriminate sentencing procedures have been superseded by the Federal Sentencing Guidelines. These "Guidelines" are in fact a statute and have the force and effect of law. They constitute the present statutory maximums. Many Circuits, including some Panels of the Third Circuit, still return to the pre-Guidelines statutory maximum. See United States v. Cepero, 224 F.3d 256, 268 (3rd Cir. 2000).

A severe conflict exists between the Panels in the Third Circuit and other Circuits on this very issue of constitutionality of the federal legislation and sentencing practice that Ring condemns. With such a state of difference of opinion there is a claim "debatable among jurists of reason", under Miller-El v. Cockrell. It is essential that this Supreme Court intervene clarify and resolve this existing conflict.

2. There Is A Conflict With This Court's Decision Respecting Ineffective Counsel Prejudice Resulting From Erroneous Stipulation of Wrongful Facts and Failure to Enforce Appearance of a Key Subpoenaed Witness.

- Attorney's performance was unreasonable under prevailing professional standards and that this performance prejudiced the defense, i.e. "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different". Government of the Virgin Islands v. Frederick, 865 F.2d 59 (3rd. Cir. 1989) (citing Strickland v. Washington, 466 U.S. 688 (1984) see "Memorandum of Law", A-49 to A-63.

- Sentencing transcripts clearly reveal that defense counsel erroneously stipulated to the Court that Appellant used government schedule known as EXH. CH-9, (as court characterizes) "in selling this deal" to the Board of Chosen Freeholders - see Memorandum of Law, A-54 to A-56.

- Defense counsel stipulated without Appellant's consent or discussion regarding reliance on said Exhibit. This schedule was not available to Appellant to sell this deal at the time of the transaction. Defense Counsel fails to correct the Court on their reliance and assumptions. The sentencing Court failed to question or inform Appellant as to the extent of defense counsel's stipulation and the Court's reliance thereon. Impact $4.7 million - approximately 78 month increase in sentence. Stipulation Is Unconstitutional. see Memorandum of Law A-54 to A-59.

"when facts which tend to establish guilt are submitted on stipulation, the Court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them". Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979)(emphasis supplied).

"Lower Courts have held that admissions and stipulations of guilt by counsel are the "functional" equivalent of guilty pleas". Cox v. Hutto, 589 F.2d 394, 296-97 (8th Cir. 1979).

"Thus like guilty pleas, the Court is required to question the defendant to determine whether he knowingly and voluntarily agreed to the admission or stipulation. Without such an inquiry, there would be constitutional error that would be presumptively prejudiced. id at 396". see also Adams v. Peterson, 968 F.2d 835, 843 (9th Cir. 1992) conviction (sentencing) based on stipulation valid only if defendant voluntarily and knowingly agreed to admission or stipulation.

Conflict With the Applicable U.S. Supreme Court Decisions
re — Sixth Amendment Violation:

To sustain a claim of ineffective assistance of counsel defendant must show that counsel's performance was deficient and that that performance prejudiced defense. Strickland v. Washington, 466 U.S. 688, 687-96 (1984), United States v. Cronic, 466 U.S. 648, 658 (1984).

The Supreme Court has stated there are exceptions to that general rule:

"In certain Sixth Amendment contexts, prejudice is presumed actual or constructive denial of counsel altogether is legally presumed to result in prejudice". Strickland, 466 U.S. at 692 (emphasis added).

Concessions and Stipulations by counsel amount to a waiver of constitutional rights of a defendant without the defendant's consent is:

"Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966)!

- Defense counsel failed to bring before the Court contradictory testimony regarding enhancement for "obstruction of justice". A-39 to A-41.

- Defense counsel fails to remind court of contradictory public testimony disclosing costs of Bond transactions; not loss as government mischaracterizes for sentencing. A-49 to A-53.

- Defense counsel failed to ask government's expert to produce work papers, that were subpoenaed, thereby, hampering defense expert witness to challenge government's report. See A-57, See Also A-143 to A-146 and A-149 to A-150.

- Defense counsel fails to enforce appearance of subpoenaed key witness at sentencing. A-59 to A-63.

The decisions in the unpublished District Court and Circuit Court opinions, in this case, clearly are in direct conflict with the decisions of this Court. Such a conflict brought about by unpublished opinions are of such a manner as to require resolution by this Court.

3. Pervasive Prosecutorial Misconduct Requires Supervision of this Supreme Court.

Quoting Supreme Court Justice George Sutherland's summation in Berger v. United States, 295 U.S. 78 (1934), stating:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The role of the government in a criminal case is not only to be the plaintiff but also to represent the defendant, by ensuring that he is treated fairly by respecting his due process rights, see A-73 to A-89, "Reply to Government's Opposition".

In light of post-trial and post-sentencing discovery, Petitioner charges that the manner and extent that the U.S. Attorney's Office, in confluence

with the Security and Exchange Commission (S.E.C.), used the investigative powers of the S.E.C. to gather information and material to support their effort to obtain a criminal indictment and conviction, in violation of an "Order" staying discovery. Discovery was denied Petitioner by this same "ORDER".

This orchestrated alliance with the S.E.C.'s Division of Enforcement did undermine and violate Petitioner's due process and Fifth Amendment privileges as warned in SEC v. Dresser, 628 F.2d 1368-1381 (1980) – see Memorandum of Law, A-65 to A-71.

- Prosecutorial misconduct claimed in Petitioner's Direct Appeal was addressed as "frivolous" by the Government. see A-111. The government then proceeds to lie to the Court stating that "no discovery was done by either party up until the time of the district court's order staying discovery". A-112. The government continues, stating that "the civil discovery process was not used to advance the criminal case against Galluzzi." -- "Moreover, the U.S. Attorney's Office did not need to use the S.E.C. civil discovery tools, given that it obtained all of the information that it needed from its own separately conducted criminal grand jury investigation". A-112.

- Post-trial discovery, obtained in 2001, from S.E.C. files clearly prove that the representations made by the government are false. A-117 to A-142 reflects the inter-agency sharing of evidence and information before and after the "Order" staying discovery until the completion of the criminal case. S.E.C. investigative material was utilized and read into the trial record. The "Order" staying discovery was as a

result of the government's objection to Petitioner's subpoena for S.E.C. discovery. Therefore, Petitioner was denied discovery of S.E.C. files, while the government acted in defiance.

The government violates provisions of SEC v. Dresser, 628 F.2d 1368,1381 (1980), which states, although establishing authority for government agencies to "conduct investigations regarding the same party, at the same time, that a criminal investigation is underway", Dresser trumpets a warning:

> id. at 1374 ..., "In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are un-objectionable" ..."the Sherman Act provides ... and the suits may be brought simultaneously or successively". "The Order of their bringing must depend upon the Government; the dependence of their trials cannot be fixed by a fast rule or made imperatively to turn upon the character of the suit."

It is obvious that the recently discovered documentation of U.S. Attorney's access requests is confirmation that S.E.C. investigation was primarily to aid the government in their criminal investigation. It is clear that this was pre-meditated and prejudicial.

Continuing-- in Dresser, at 1375—1376:

> "other than where there is specific evidence of "Agency Bad Faith" or malicious government tactics, the strongest case for deferring civil proceedings is where a party under indictment --

> - is required to defend a civil or administrative action involving the same matter". The non-criminal proceeding, if not deferred, might undermine the party' s Fifth Amendment privilege against self – incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b) --- or otherwise prejudice the case". id. 1376. Dresser also states at 1381---"there is no danger that Justice might broaden its discovery rights, because the subpoena power of the grand jury is as broad---perhaps broader than that of the SEC". Justice can procure from Dresser (Appellant) directly whatever materials it might procure indirectly through the SEC." "In fact, party investigated under SEC rules instead of grand jury procedures is accorded far greater protection---".

The U.S. Attorney's actions in concert with the S.E.C. violates the significant tenant of the above cite. see Memorandum of Law, A-66 to A-68. A clear violation of Appellant's 5th Amendment privilege is perpetrated. To further prevent justices right to criminal discovery in concert with the S.E.C.:

> "the strict limitation on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17, do not take effect until after a grand jury has returned an indictment." Id. at 1381.

See Memorandum of Law A-66 to A-71.

The U.S. Attorney violated this rule, by their request and receipt, through an S.E.C. Senior Attorney, a copy of Appellant's deposed privileged testimony, almost two months after the indictment issued January 7, 1997. See A-115 Therefore, two violations exist. (1) Untruthfully stating that no discovery was conducted prior to the issuance of an Order staying discovery until completion of the criminal matter, and (2) violation of Federal Rules limiting discovery after an indictment has been returned.

The newly discovered evidence is clear documented proof that the U.S. Attorney is guilty of prosecutorial misconduct and their obvious partnership with the S.E.C. to conceal or suppress evidence is indeed Agency Bad Faith.

Newly discovered documents, from S.E.C. files, also revealed that the County of Essex conducted a Refunding Bond Sales in 1995, similar to the one issued in 1989. See A-147 to A-148. The 1989 issue was mischaracterized as fraudulent by the U.S. Attorney and the Courts, resulting in an enhancement of at least 78 months to Appellant. No one was indicted regarding the 1995 Bond Issue. The availability of this documentation would have impacted favorably against a 14 point enhancement from the Court.

Additional new discovery reflects the impact of a subpoenaed witness, Clifford Goldman, regarding the significant 1989 Bond Refunding that became a sentencing factor. Witness did not appear; the Court determined his testimony was not necessary. Defense counsel failed to object to Court's decision, and discovery revealed that Mr. Goldman was told that he

did not have to appear in answer to subpoena, at Appellant's sentencing hearing, see Memorandum of Law, A-59 to A-63.

Petitioner begs that based on the facts presented, serious concerns are evident regarding due process rights, prosecutorial misconduct, ineffective assistance of counsel, court's interference in defense arguments, critical sentencing errors resulting of the court's improper reliance on inaccurate information and defense counsel's stipulation. Such an improper deviation from the accepted and usual course of judicial proceedings and prosecutorial responsibility warrants the exercise of this Court's power of supervision and the granting of this petition for certiorari.

Conclusion

The Petition for a writ of Certiorari should be granted.

Respectfully submitted,

January 23, 2004

Joseph P. Galluzzi , Pro Se

(2)

Supreme Court, U.S.
FILED

031201 FEB 19 2004

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH P. GALLUZZI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI APPENDIX

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F/0

INDEX TO APPENDICES

Order and Opinion of United States Court of Appeals for the Third Circuit dated April 29, 2003. A-1

Decision of United States District Court for the District of New Jersey dated June 26, 2002. A-3

Denial of Petition for Rehearing, re: Certificate of Appealability September 26, 2003 A-14

Application for Certificate of Appealability dated November 1, 2002 A-15

Memorandum of Law Supporting Petition for Certificate of Appealability dated November1, 2002. A-25

Petitioner's Reply Brief to Opposition for Certificate of Appealability dated December 26, 2002. A-73

Third Circuit - The Forerunner to Ring A-91

Petition for Rehearing In Banc or Before Panel dated May 8, 2003. A-95

Brief for Appellee - Direct Appeal. A-110

SEC Correspondence to AUSA Ralph Marra dated March 7, 1997. A-115

SEC Privileged Log A-117

Affidavit - Felipe Ferrand Defense Expert
dated September 11, 2000 A-143

Memo - New Jersey Local Finance Board
dated May 1, 1995. A-147

Reply Brief for Appellant-Direct Appeal Page 4. A-149

Report Andrew Kalotay Associates -
Additional Defense Expert—§2255 Petition
dated October 12, 2000. A-151

APS-176 April 10, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 02-3267

JOSEPH GALLUZZI
VS.
UNITED STATES OF AMERICA
(D.N.J. CIV. NO. 00-CV-05952)

Present: SLOVITER, MCKEE, AND SMITH, CIRCUIT JUDGES.

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(l);

(2) Appellant's memorandum of law in support thereof;

(3) Appellee's memorandum of law in opposition thereto;

(4) Appellant's reply; and

(5) Appellant's document titled "Motion to File Over Length Memorandum of Law in Support of Application for Certificate of Appealability" construed as "Second Motion for Leave to File Memorandum of Law in Excess of 20 pages" in the above-captioned case.

Respectfully,

Clerk

MMW/WMS/zm/clc

ORDER

Appellant's "Motion to File Over Length Memorandum of Law in Support of Application for Certificate of Appealability," construed as "Second Motion for Leave to File Memorandum of Law in Excess of 20 Pages" is granted. However, the foregoing request for a certificate of appealability is denied. The District Court's conclusion that appellant's claims are meritless is not debatable among jurists of reason. Miller-El v. Cockrel No. 01-7662, 2003 WL 431659 (U.S. Feb. *25,* 2003).

By the Court,

signature

Circuit Judge

Dated: April 29, 2003

CLC/CC:JPG,GSL,GJM

ORIGINALLY FILED
JUN 27 2002
HON WILLIAM H. WALLS

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH P GALLUZZL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

OPINION
Civ. No. 00-5952 (WHW)
Crim. No. 96-640

Walls, District Judge

Petitioner Joseph P. Galluzzi ("Petitioner") petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Respondent, the United States of America, opposes the petition. For the reasons stated in this opinion, the petition is denied.

FACTS AND PROCEDURAL HISTORY

From 1982 to 1992, as a public official in Essex County,[1] Petitioner received kickbacks and bribes for referring bond and financing projects to various entities. Also in his official capacity, Petitioner pushed for a $104 million Debt Restructuring Plan (the "Restructuring Plan") for Essex County. The government argues that this Restructuring Plan cost the citizens of Essex County millions of dollars.

[1] Petitioner held the following positions: he was the financial consultant to the Board of Chosen Freeholders. the legislative body of Essex County, between 1982 and 1987; Treasurer of Essex County between 1987 and July 1989; the financial consultant to Essex County between August 1989 and December 1990; and he was the financial consultant to the Irvington Municipal Council between 1987 and June 1992.

On January 9, 1997, Petitioner was charged with fourteen counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1346 (Counts 1-8, 10-15); two counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 1346 (Counts 9, .16); five counts of bribery in violation of 18 U.S.C. § 666 (Counts 17-21); and five counts of using a facility in interstate commerce to commit bribery in violation of 18 U.S.C. § 1952 (Counts 22-26). Petitioner was convicted of all 26 counts of the indictment in a jury trial before this Court. On the 9th and 10th of September, 1998, this Court held sentencing hearings where both the government and the defense presented expert witnesses on the issue of loss caused by the 1989 Refunding Bond Deal. After the sentencing hearings, this Court found that the Government had proven by a preponderance of the evidence that the loss exceeded $5 million, warranting an increase of 14 levels to the offense level. This Court also determined that a 2-level increase for obstruction of justice was warranted based upon testimony before the Securities Exchange Commission ("SEC"). The final offense level was therefore 28 with the corresponding sentencing range of 78-97 months. In the Judgment and Conviction entered on September 18, 1998, Petitioner was sentenced to 90 months of incarceration on Counts 1-11 and 17-21, which were to be served concurrently with 60 months of incarceration on Counts 16 and 22-26; and 80 months on Counts 12-15.

On September 15, 1998, Petitioner filed a notice of appeal to the United States Court of Appeals for the Third Circuit arguing that (1) the evidence of guilt was legally insufficient; (2) the district court erroneously admitted certain evidence; (3) the prosecutors conduct in connection with a civil proceeding was improper; (4) the Court should have applied a heightened burden of proof when evaluating the amount of loss; and (5) the Court's findings regarding loss and obstruction were not supported by the record. The conviction and sentence were affirmed on May 28, 1999, and

a petition to the United States Supreme Court for a writ of certiorari was denied on December 6, 2000.

On December 6, 2000, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Petitioner alleges that (I) he was denied due process because his sentence was unconstitutionally enhanced under the standard set forth in Apprendi v New Jersey, *530* U S 466, 120 S. Ct. 2348, 147 L.Ed.2d 435, (2000); (2) he was denied due process because the Court did not require proof of loss and obstruction beyond a reasonable doubt or by clear and convincing evidence; and (3) he received ineffective assistance of counsel.

DISCUSSION

1. Standard of Review

The grounds for collateral attack of a sentence pursuant to § 2255 are narrowly limited. Kikumara v. U.S., 987 F. Supp. 563, 574 (D.N.J. 1997). To be entitled to relief, a habeas petitioner must establish that his sentence "was imposed in violation of the Constitution or law of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack," 28 U.S.C. § 2255. A §2255 motion is to he granted only if the sentence resulted in a fundamental defect, which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure. Kikumara, 987 F. Supp. at 574.

2. Analysis

A. Petitioner's Sentence Was Not Unconstitutionally Enhanced

Petitioner contends, based on Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), that the district court deprived him of his due process rights by enhancing his sentences on the basis of loss and obstruction of justice, where the jury was not asked to decide these issues. In Apprendi, the Supreme Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. However, the Appendi Court recognized that "nothing in history ...suggests that it is impermissible for judges to exercise discretion, taking into consideration various factors relating both to offense and offender, in imposing judgement within the range prescribed by statute." United States v. Williams, 235 F.3d 858, 868 (3d Cir. 2000) (quoting Apprendi 530 U.S. at 481). Apprendi is not applicable to Petitioner's situation because the penalty imposed on Petitioner was within the statutory range.

As example, the Third Circuit in Williams, held "[b]ecause application of the Sentencing Guidelines in this case does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of Apprendi v. New Jersey (citation omitted) are not relevant here" Id., at 863 (quoting United States v. Cepero, 224 F.3d 256, 267 n. 5 (3d. Cir. 2000)). In Williams, the sentence of the defendant charged with conspiracy to distribute heroin depended on the amount of drugs involved. The Third Circuit held that the district court had the discretion to increase the defendant's sentence under the Sentencing Guidelines, based on its findings because it did not exceed the statutory maximum.

Here, as in Williams, Petitioner's sentencing level depended on the amount of money his acts of fraud and bribery cost the government and citizens of Essex County. The Sentencing Guidelines directs Courts to increase, the

sentencing level by the corresponding number from the table in §2F1 .1 (Fraud and Deceit), if the loss to the government from the offense exceeded $2,000. U.S. Sentencing Guidelines Manual §2C1.1(b)(2)(A) (1997). For a loss of $5,000,000 or more the sentencing level is to be increased 14 levels. U.S. Sentencing Guidelines Manual §2F1.1(b)(1)(O) (1997). Accordingly, the sentence of 90 months imposed on defendant was within the statutory range and Apprendi is not applicable.

Even assuming Apprendi were applicable to the facts here, it should not he applied because it established a "new rule" of constitutional law which may not he applied retroactively. Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989). "A holding constitutes a 'new rule' within the meaning of Teague, if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendants conviction became final.'" Graham v. Collins, 506 U.S. 461, 467, 113 S. Ct, 892, 897 (1993) (quoting Teague, 489 U.S., at 301) (emphasis in original).

The Supreme Court has set forth two exceptions when the new rule should be retroactively applied. The first exception is for new rules "forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." O'Dell v. Nethrland, 521 U.S. 151, 157, 117 S. Ct. 1969, 1973 (1997) (quoting Penry v.Lynaugh, 492 U.S. 302, 330, (1989)). The second exception "permits retroactive application of 'watershed les of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" O'Dell, 521 U.S. at 175, (citations omitted), (quoting Teague, 489 U.S. at 311). The Apprendi rule falls within the Teague description of a new rule, and is inapplicable here because it does not fit one of the two exceptions. See Levan v. U.S. 128 F. Supp. 2d 270, 278